No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,
Appellants,

v.

CORNELIUS C. WATTS, *et al.*,
Appellees,

MEMORANDUM ON BEHALF OF PLAINTIFFS AND DEFENDANTS BOULDIN.

HERBERT NOBLE,
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WELDON M. BAILEY,
Attorneys for Bouldins.

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Memorandum in opposition to the Allowance of an Appeal to the Supreme Court of the United States.

The plaintiffs, and the Bouldin defendants, desire to present this memorandum, setting forth the reasons why this Court should not allow an appeal from its decision to the Supreme Court of the United States.

It may be claimed that an appeal will lie in this case because it is one which "arises under the Constitution or laws of the United States," and is, therefore, not made final in the United States Circuit Court of Appeals by section 128 of the Judicial Code. If this

case is one arising under the "laws of the Unted States," then an appeal will lie; if it is not such a case, within the meaning of the Judicial Code, then no appeal will lie.

Argument.

The District Court had jurisdiction of this case solely on the ground of *diversity of citizenship,* and the preliminary paragraph of the plaintiffs' bill of complaint is devoted to setting out the diversity of citizenship which gave the District Court jurisdiction. We contend that that was the sole ground upon which the District Court had jurisdiction. In the case of *Shulthis* v. *McDougal,* 225 U. S. 561, an appeal was sought to the Supreme Court of the United States from the Circuit Court of Appeals for the Eighth Circuit on the ground that the case was one arising under the "laws of the United States." The Supreme Court, in an opinion by Mr. Justice Van Devanter, dismissed that appeal and set forth succinctly the rules by which the appealability of such causes are determined. The Court say (568):

> "Section 6 of the act of March 3, 1891, (now section 128 of the Judicial Code) * * * declares that 'the judgments decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States,' and this refers

to the jurisdiction of the Federal court of first instance."

* * * * * * * *

and (p. 569):—

"In opposing the motion the appellants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

"1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Central Mining Co.* v. *Turk,* 150 U. S. 138; *Tenneessee* v. *Union and Planters Bank,* 152 U. S. 454; *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526; *Devine* v. *Los Angeles,* 202 U. S. 313, 333.

"2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred

argumentatively from the statements in the bill, for jurisdiction cannot rest or any ground that is not affirmatively and distinctly set forth. *Handford* v. *Davies,* 163 U. S. 273, 279; *Mountain View Mining Co.* v. *McFadden,* 180 U. S. 533; *Bankers' Casualty Co.* v. *Minneapolis & Co.,* 192 U. S. 371, 383, 385.

"3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. *Little York Gold-Washing and Water Co.* v. *Keyes,* 96 U. S. 199; *Colorado Central Mining Co.,* v. *Turk, supra; Blackburn* v. *Cortland Gold Mining Co.,* 175 U. S. 571; *Florida Central & P. Railroad Co.* v. *Bell,* 176 U. S. 321; *Shoshone Mining* v. *Rutter,* 177 U. S. 505; *De Lamar's Nevada Co.* v. *Nesbitt,* Id. 523."

The foregoing case is cited and followsd in:—

Hitchman C. & C. Co. v. *Mitchell,* 241 U. S. 644;
Glass v. *Woodman,* 241 U. S. 646;

Gardiner Inc. Co. v. *The Jackson Co.* 239 U. S. 628;
Mound City Co. v. *Castleman,* 235 U. S. 689;
Raphael v. *W. & J. R. R. Co.,* id. 684;
Ritterbusch v. *A. T. & S. F. Ry. Co.,* id. 683;
Glenwood L. & W. Co. v. *Glenwood Springs,* 231 U. S. 735;
Star Chronicle Pub. Co. v. *United Press Association,* 232 U. S. 714.

The Bill of Complaint.

The first paragraph of the bill of complaint sets out in full the 6th section of the Act of Congress approved June 21, 1860. The second paragraph alleges that on June 17, 1863, pursuant to the provisions of said act, the heirs of Luis Maria Baca selected the land here in controversy. At no other place in the bill of complaint does any mention of an act of Congress occur. The paragraphs subsequent to paragraph two are devoted to tracing the title on down to the present owners. It does not appear on the face of the bill of complaint that there is any dispute or controversy respecting the validity, construction or effect of the act of June 21, 1860, upon the determination of which the result of the suit depends. The act of June 21, 1860, is set out merely as one of the instruments in the chain of title; as the original grant from the sovereign to the heirs of Baca. There is no allegation that the result of the suit depends upon the validity, construction or effect of that act, and no intimation whatever that the jurisdiction of the Dis-

trict Court is sought upon the ground that any controversy has arisen under that act. On the other hand, the jurisdiction is expressly predicated upon the ground of diversity of citizenship. Any federal question which may have arisen in this case does not appear in the bill of complaint, and unless that question does appear in the bill of complaint, the case is not one arising under the "laws of the United States."

The third section of Justice Van Devanter's statement of the rules by which the appealability of such causes shall be determined fits this case exactly. The right of the plaintiffs and the Bouldin defendants to this land has its origin in the act of June 21, 1860, and this is "a suit involving rights to land acquired under a law of the United States." That is the only reason why the sixth section of that act of Congress is quoted in the bill, and, as Mr. Justice Van Devanter has well said, if that be a sufficient ground upon which to predicate an appeal then every suit involving land in the western States must be one arising under the "laws of the United States", because the source of the title to practically all land in the West is some land grant act of the United States.

Some other cases involving the right to an appeal in cases of a nature similar to this are:

Metcalf v. *Watertown,* 128 U. S., 586.

Joy v. *City of St. Louis,* 122 Fed., 524. (In this case the court says that "it is settled law that all doubts must be resolved against jurisdiction.)

Myrtle v. *Nevada C. & O. Ry.*, 137 Fed., 193.

Bagley v. *Fire Extinguisher Co.*, 212 U. S., 477.

Montana Ore-Purchasing Co. v. *Boston & M. Consol. Copper & Silver Mining Co.*, 93 Fed., 274 (decided by the United States Circuit Court of Appeals for the Ninth Circuit).

If the validity, construction or effect of the act of June 21, 1860, had been involved, the case would not be appealable for the reason that the act is not within the designation of "laws of the United States" as used in allowing appeals. As said in *American Security & Trust Co.* v. *Comm'rs D. C.*, 224 U. S. 491, the law must be one of general application throughout the United States. This the act of June 21, 1860, certainly was not.

For the reasons given above, we respectfully pray the Court not to allow an appeal to the Supreme Court of the United States from their decision in this case.

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